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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

08 SUSAN J. PHILLIPS,) CASE NO. C09-0246-MJP-MAT
09 Plaintiff,)
10 v.) REPORT AND RECOMMENDATION
11 MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
12 Defendant.)
13 _____)

14 Plaintiff Susan J. Phillips appeals the final decision of the Commissioner of the Social
15 Security Administration (“Commissioner”) which denied her applications for Disability
16 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI
17 of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an
18 administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that
19 the Commissioner’s decision be REVERSED and REMANDED.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff was born in 1963, and was 45 years old on the date of the ALJ’s decision.
22 Administrative Record (“AR”) 30. She has a high school education. (AR 30-31.) Her past

01 work experience includes employment as a janitor. (AR 33-34.) Plaintiff was last gainfully
02 employed in 2004. (AR at 13, 26.)

03 Plaintiff asserts that she is disabled due to degenerative disc disease, degenerative joint
04 disease, obesity, hypertension, affective disorder, anxiety-related disorder, personality
05 disorder, and substance abuse. (AR 13-15, 152.) She asserts an onset date of January 1,
06 2005. (AR 11, 26-27.)

07 The Commissioner denied plaintiff's claim initially and on reconsideration. (AR 11,
08 66-78.) Plaintiff requested a hearing, which took place on October 10, 2008. (AR 23-61.) On
09 November 25, 2008, the ALJ issued a decision finding plaintiff not disabled. (AR at 11-22.)

10 The Appeals Council denied plaintiff's request for review, (AR at 1-3), making the
11 ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. §
12 405(g). On February 25, 2009, plaintiff timely filed the present action challenging the
13 Commissioner's decision. (Dkt. No. 1.)

14 II. JURISDICTION

15 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
16 405(g) and 1383(c)(3).

17 III. STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
19 social security benefits when the ALJ's findings are based on legal error or not supported by
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
21 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
22 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

01 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
02 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
03 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
04 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it
05 may neither reweigh the evidence nor substitute its judgment for that of the Commissioner.
06 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to
07 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.
08 *Id.*

09 The Court may direct an award of benefits where "the record has been fully developed
10 and further administrative proceedings would serve no useful purpose." *McCartey v.*
11 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
12 (9th Cir. 1996)). The Court may find that this occurs when:

13 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
14 claimant's evidence; (2) there are no outstanding issues that must be resolved
15 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

16 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
17 erroneously rejected evidence may be credited when all three elements are met).

18 IV. DISCUSSION

19 The Commissioner follows a five-step sequential evaluation process for determining
20 whether a claimant is disabled. *See* 20 C.F.R. § 404.1520, 416.920 (2000). At step one, it
21 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff has
22 not engaged in substantial gainful activity since the alleged onset date of January 1, 2005. (AR

13.) At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff has the following severe impairments: degenerative disc disease, degenerative joint disease, obesity, hypertension, affective disorder, anxiety-related disorder, personality disorder, and substance abuse disorder. (AR 13-15.) Step three asks whether a claimant's impairments meet or equal the requirements of a listed impairment. The ALJ found that plaintiff did not have an impairment or combination of impairments that meet or equal a listed impairment. (AR 15-16.) If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity ("RFC") and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ assessed plaintiff's physical RFC:

[Plaintiff] has the residual functional capacity to lift and/or carry up to 20 pounds occasionally and 10 pounds frequently, stand and/or walk about 6 hours in an 8-hour workday, and sit about 6 hours in an 8-hour workday. The [plaintiff's] ability to push and pull is unlimited within the lift/carry guidelines. The [plaintiff] can frequently climb ramps and stairs, and occasionally climb a ladder, ramp, or scaffold. She can frequently balance and kneel, and occasionally stoop, crouch, and crawl. The claimant should avoid concentrated exposure to vibrations, as well as fumes/odors, dusts, gasses, poor ventilation, etc. She should also avoid concentrated exposure to hazards, such as machinery and heights.

(AR 16-17.) The ALJ also assessed plaintiff's mental capacity:

[Plaintiff] has the mental capability to adequately perform the mental activities generally required by competitive, remunerative, unskilled work as she can understand, remember, and carry out simple instructions compatible with unskilled work. [Plaintiff] possesses an average ability to perform sustained work activities (i.e. can maintain attention and concentration; persistence and pace) in an ordinary work setting on a regular and continuing basis (i.e. 8 hours a day for 5 days a week, or equivalent) within customary tolerances or employers rules regarding sick leave and absence. [Plaintiff] is able to make judgments commensurate with the functions of unskilled work (i.e. simple work-related

01 decisions), respond appropriately to supervision, co-workers and work
02 situations, and deal with changes all within a routine work setting. The
[plaintiff] should not deal with the general public in a regular fashion, however,
03 incidental contact is acceptable.

04 (AR 17.) The ALJ found that plaintiff is able to perform her past relevant work as a janitor.

05 (AR 20.) If the claimant is able to perform her past relevant work, she is not disabled; if the
06 opposite is true, then the burden shifts to the Commissioner at step five to show that the
07 claimant can perform other work that exists in significant numbers in the national economy,
08 taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R.
09 §§ 404.1520(g), 416.920(g); *Tackett v. Apfel*, 180 F.3d 1094, 1099-1100 (9th Cir. 1999).

10 Although the ALJ concluded that plaintiff is able to perform her past relevant work, the ALJ
11 also found that plaintiff could perform other work existing in significant numbers in the
12 national economy, such as deli cutter/slicer, housekeeper, and bottle packer. (AR 21-22.)
13 Accordingly, the ALJ concluded that plaintiff is not disabled. (AR 22.)

14 Plaintiff argues that the ALJ erred in (1) evaluating the medical evidence; (2) evaluating
15 her credibility; and (3) evaluating whether her impairments meet or equal a listed impairment.
16 (Dkt. No. 15.) She requests remand for an award of benefits or, alternatively, for further
17 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
18 substantial evidence and should be affirmed. (Dkt. No. 16.) For the reasons described below,
19 the Court agrees with the plaintiff.

20 A. Medical Opinion Evidence

21 As a matter of law, more weight is given to a treating physician's opinion than to that of
22 a non-treating physician because a treating physician "is employed to cure and has a greater

01 opportunity to know and observe the patient as an individual.” *Magallanes*, 881 F.2d at 751;
02 20 C.F.R. § 404.1527(d)(1)-(2). “Likewise, greater weight is accorded to the opinion of an
03 examining physician than a non examining physician.” *Andrews*, 53 F.3d at 1041.

04 However, under certain circumstances, a treating or examining physician’s opinion can
05 be rejected, whether or not that opinion is contradicted by other medical evidence of record.
06 *Magallanes*, 881 F.2d at 751. An ALJ must give clear and convincing reasons for rejecting a
07 treating or examining physician’s opinion if that opinion is not contradicted by other evidence,
08 and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
09 1998). “This can be done by setting out a detailed and thorough summary of the facts and
10 conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Id.*
11 (*citing Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his
12 conclusions. “He must set forth his own interpretations and explain why they, rather than the
13 doctors’, are correct.” *Id.* (*citing Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).
14 Such conclusions must at all times be supported by substantial evidence. *Id.*

15 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
16 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*
17 *v. Chater*, 81 F.3d 821, 830-34 (9th Cir. 1995)(finding that, if doctors’ opinions and plaintiff’s
18 testimony were credited as true, plaintiff’s condition met a listing) (*quoting Hammock v.*
19 *Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion as a matter of law is
20 appropriate when, taking that opinion as true, the evidence supports a finding of disability. *See*
21 *Smolen*, 80 F.3d at 1292 (ALJ’s reasoning for rejecting subjective symptom testimony,

01 physicians' opinions, and lay testimony legally insufficient; finding record fully developed and
02 disability finding clearly required).

03 However, courts retain flexibility in applying this crediting as true theory. *Connett v.*
04 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
05 were insufficient findings as to whether plaintiff's testimony should be credited as true). As
06 stated by one district court: "In some cases, automatic reversal would bestow a benefits
07 windfall upon an undeserving, able claimant." *Barbato v. Comm'r of Soc. Sec. Admin.*, 923 F.
08 Supp. 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a
09 good faith error, in that some of his stated reasons for rejecting a physician's opinion were
10 legally insufficient).

11 1. *Thomas Schneider, M.D., and Joan E. Miller, M.D.*

12 The plaintiff argues that the ALJ erroneously relied on the opinion of non-examining
13 state agency physician Joan E. Miller, M.D., over the opinion of treating physician Thomas
14 Schneider, M.D., without a clear and convincing basis. (Dkt. No. 15 at 14-15.) The
15 Commissioner responds that the ALJ properly considered the opinion of Dr. Schneider and
16 gave it "some weight," but found his conclusion that plaintiff could perform only sedentary
17 work inconsistent with the medical evidence. (Dkt. No. 16 at 10-12.)

18 Dr. Schneider was plaintiff's primary care provider at Family Health Associates for
19 more than eleven years from approximately January 1997 through June 2008. (AR 266-438,
20 530-44, 594-601, 574-79.) Dr. Schneider examined the plaintiff on June 4, 2008, and reported
21 his findings on a Physical Evaluation form provided by the Department of Social and Health
22 Services ("DSHS"). (AR 573-79). He diagnosed plaintiff with "marked" low back pain

01 which interferes with her ability to sit, stand, walk, lift, carry, and bend. (AR 576.) He
02 opined that she is unable to balance, bend, climb, crouch and kneel for more than five minutes.
03 *Id.* He further opined that plaintiff was limited to sedentary work, which is defined on the
04 DSHS form as “the ability to lift ten pounds maximum and frequently [2.5 to six hours in an
05 eight-hour day] lift and/or carry such articles as files and small tools. A sedentary job may
06 require sitting, walking, and standing for brief periods.” *Id.* Dr. Schneider indicated that
07 plaintiff is treated with analgesics and anti-inflammatories which control her pain, but provide
08 no resolution. (AR 575.) He recommended physical therapy and “possibly injection therapy
09 or surgery.” (AR 577.)

10 The ALJ noted that since Dr. Schneider’s physical evaluation, plaintiff “has engaged in
11 physical therapy with positive results, as predicted by Dr. Schneider.” (AR 19.) The ALJ
12 concluded that “[a]s the treating physician, and having been correct regarding his prescription
13 for physical therapy, some weight must be afforded Dr. Schneider’s opinion.” (AR 19.)
14 Nevertheless, the ALJ relied on the contrary opinion of non-examining state agency physician
15 Dr. Miller to find that plaintiff could still perform a wide range of light work.

16 On June 23, 2008, Dr. Miller completed a Physical Residual Functional Capacity
17 Assessment. (AR 565-72.) Dr. Miller listed plaintiff’s “primary diagnosis” as lumbar
18 degenerative disc disease, degeneration joint disease, and scoliosis; plaintiff’s “secondary
19 diagnosis” as hypertension; and “other alleged impairments” as asthma, abdominal wall hernia,
20 and obesity. (AR 565.) Dr. Miller concluded that “[plaintiff’s] allegations are not fully
21 supported by the serial evidence in file.” (AR 567.) She opined that plaintiff can lift 20
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01 pounds occasionally and 10 pounds frequently, stand and/or walk for 6 hours in an 8-hour day,
02 sit for a total of 6 hours in an 8-hour day, and is unlimited in pushing or pulling. (AR 566.)

03 The ALJ stated, “Dr. Miller is a non-examining physician, and as such her opinion
04 generally will not be afforded as much weight as those of treating physicians.” (AR 19.)
05 However, the ALJ concluded that “her opinion deserves some weight, particularly in a case
06 such as this where the objective medical evidence is supportive. Dr. Miller is an objective
07 party, and unlikely to be sympathetic or prejudiced towards or against the [plaintiff.]” *Id.* For
08 these reasons, the ALJ gave Dr. Miller’s opinion “substantial weight” and adopted her findings
09 in determining plaintiff’s physical residual capacity. *Id.*

10 In this case, the ALJ’s rejection of Dr. Schneider’s opinion was neither specific nor
11 legitimate. Nor was it supported by substantial evidence. The ALJ merely mentions that
12 since Dr. Schneider’s physical evaluation, “plaintiff has engaged in physical therapy with
13 positive results.” (AR 19.) While plaintiff’s six physical therapy visits yielded “notable
14 improvement,” there is no indication that plaintiff has the ability to work on a sustained basis.
15 (AR 604.) Contrary to the ALJ’s assertions, her physical therapist notes plaintiff’s back pain
16 level is 6/10, and she is still unable to walk more than two minutes. (AR 603.) Although the
17 ALJ indicates that objective medical evidence supports Dr. Miller’s assessment, he fails utterly
18 to set out a detailed and thorough summary of the facts and conflicting evidence. The ALJ had
19 the discretion to reject Dr. Schneider’s opinion in favor of the conflicting opinion of another
20 physician, but only after “setting forth specific, legitimate reasons for doing so that are based on
21 substantial evidence in the record.” *Connett*, 340 F.3d at 874.

22 The ALJ also states that Dr. Miller’s opinion is somehow more credible because she is

01 “an objective party, and unlikely to be sympathetic or prejudiced towards or against the
02 [plaintiff.]” (AR 19.) “An examining doctor’s findings are entitled to no less weight when
03 the examination is procured by the claimant than when it is obtained by the Commissioner . . .
04 [t]he Secretary may not assume that doctors routinely lie in order to help their patients collect
05 disability benefits.” *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995)(citation and quotation
06 omitted); *see also Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996)(noting that source of
07 patient’s referral was improper basis for assessing doctor’s credibility, where doctor’s opinion
08 was based on an examination of claimant, where there was no inconsistency between his report
09 and his treating notes, and where there was no evidence of any actual improprieties or evidence
10 that doctor was attempting to mislead the ALJ). The record does not show any bias on the part
11 of Dr. Schneider, and the ALJ is not permitted to infer that such bias exists. This asserted
12 advocacy is not a legitimate reason to reject or discredit Dr. Schneider’s opinion.

13 On remand, the ALJ should reassess the findings of Dr. Schneider who is, after all, one
14 of the plaintiff’s physicians, the opinions of which the ALJ purportedly assigned “some
15 weight.” (AR at 19.) To the extent the ALJ relies on the opinion of non-examining state
16 agency physician Dr. Miller to reject the opinion of Dr. Schneider on remand, the ALJ must
17 explain where and how these physicians’ conclusions differ. As stated above, “[t]his can be
18 done by setting out a detailed and thorough summary of the facts and conflicting evidence,
19 stating his interpretation thereof, and making findings;” in doing so, the ALJ must “explain why
20 [his findings], rather than the doctors’, are correct.” *Reddick*, 157 F.3d at 725 (citations
21 omitted). To that end, should significant differences be established, the ALJ must keep in
22 mind that “[t]he opinion of a nonexamining physician cannot by itself constitute substantial

evidence that justifies the rejection of the opinion of . . . an examining physician.” *Widmark v. Barnhart*, 454 F.3d 1063, 1067 (9th Cir. 2006)(internal citations omitted).

2. *Jenny Walter, PA-C*

In order to determine whether a claimant is disabled, an ALJ may also consider lay witness testimony, such as testimony by nurse-practitioners, physicians’ assistants, and counselors, as well as “non-medical” sources, such as spouses parents, siblings, and friends. *Stout v. Comm’r*, 454 F.3d 1050, 1053 (9th Cir. 2006); 20 C.F.R. § 404.1513(d). Such testimony regarding a claimant’s symptoms or how an impairment affects her ability to work is competent evidence, and cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). This is particularly true for such “non-medical” sources such as nurses and physicians’ assistants. *See* SSR 06-03p (noting that because such persons “have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists,” their opinions “should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file.”) If an ALJ wishes to discount the testimony of a lay witness, he must provide “reasons that are germane to each witness” and may not simply categorically discredit the testimony. *Dodrill*, 12 F.3d at 919.

Here, the ALJ appeared to completely ignore, and indeed failed to even mention, the records and opinions of physicians’ assistant Jenny Walter, PA-C (AR 606-10, 611-59), who offered opinions regarding the severity of plaintiff’s back impairment. This complete lack of analysis constitutes reversible error that must be corrected on remand. *See, e.g., Stout*, 454

01 F.3d at 1053 (concluding that even non-medical lay testimony “cannot be disregarded without
02 comment”).

03 B. Credibility

04 Because this case is being remanded for the reasons detailed above, the Court eschews
05 an exhaustive analysis of the ALJ’s credibility determination. In light of the fact that the Court
06 has found that the ALJ failed to properly evaluate the opinions of Dr. Schneider and the
07 testimony of Ms. Walter, and because credibility determinations are inescapably linked to
08 conclusions regarding medical evidence, 20 C.F.R. § 404.1529, the ALJ’s credibility finding is
09 also reversed and the issue remanded. After re-evaluating the medical evidence of record, the
10 ALJ will be in a better position to evaluate the plaintiff’s credibility. To this end, the ALJ is
11 reminded that he must do more than make general findings; rather, when evaluating a
12 claimant’s credibility, the ALJ “must specifically identify what testimony is credible and what
13 testimony undermines the claimant’s complaints.” *Greger v. Barnhart*, 464 F.3d 968, 972 (9th
14 Cir. 2006)(internal quotations omitted). On remand, the ALJ should properly assess plaintiff’s
15 testimony, and provide clear and convincing reasons for rejecting it should such a conclusion be
16 warranted.

17 C. Listed Impairments

18 Because this case is being remanded for the reasons detailed above, the Court likewise
19 eschews a detailed analysis of whether plaintiff’s impairments meet or medically equal any of
20 the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d).
21 In light of the fact that the Court has found that the ALJ failed to properly evaluate the opinions
22 of Dr. Schneider and the testimony of Ms. Walter, and because determinations regarding

01 whether an impairment meets or equals any of the listed impairments are closely tied to
02 conclusions regarding medical evidence, the ALJ's step three determination is also reversed
03 and remanded. On remand, the ALJ shall explain his findings step three, including an analysis
04 of whether plaintiff's physical and mental impairments individually or combined meets or
05 equals one of the listed impairments.

06 V. CONCLUSION

07 Because the ALJ erred by failing to provide legally sufficient reasons for rejecting the
08 opinions of Dr. Schneider, erred by improperly assessing testimony from "other sources"
09 pursuant to 20 C.F.R. § 404.1513(d), erred by improperly discrediting plaintiff's subjective
10 complaints, this case is REVERSED and REMANDED for further proceedings not inconsistent
11 with this Order. On remand, the ALJ should reevaluate the medical evidence regarding
12 plaintiff's mental and physical impairments, reassess and give proper weight to the opinion of
13 Dr. Schneider, reevaluate plaintiff's RFC and reassess plaintiff's credibility, taking into
14 consideration "other source" testimony of Ms. Walter. To the extent that the plaintiff's
15 impairments and/or limitations are modified on remand, the ALJ should recall a Vocational
16 Expert ("VE") at step five, and propound a hypothetical to the VE that incorporates all
17 impairments and limitations supported by substantial evidence in the record. With this
18 information, the ALJ should then apply all appropriate steps of the sequential evaluation
19 process to determine whether plaintiff's severe impairments render her disabled for purposes of
20 Titles II and XVI of the Social Security Act. A proposed order accompanies this Report and
21 Recommendation.

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01 DATED this 6th day of January, 2010.

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04 Mary Alice Theiler
05 United States Magistrate Judge
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